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No. 83-1875

In The
Supreme Court of the United States
October Term, 1983

FRED SMITH, Commissioner, Alabama Department of Corrections, and W. E. JOHNSON, Warden, Holman Unit,

Petitioners,

vs.

WAYNE EUGENE RITTER,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE STATE OF NORTH CAROLINA AND THE COMMONWEALTHS AND STATES OF ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Did the court of appeals err in expanding federal habeas review to encompass facial attacks on state statutes, so that one to whom a statute is constitutional as applied may have his conviction or sentence set aside based upon how the statute might operate in some other case?

2. Did the court of appeals err in holding that *Zant v. Stephens,* 103 S.Ct. 2733 (1983), and *Lockett v. Ohio,* 438 U.S. 586 (1978), absolutely bar application of the harmless error rule to certain types of sentencing defects in capital cases regardless of the facts and circumstances?

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The states listed above, by and through their respective Attorneys General, appear on behalf of their citizens, and pursuant to Rule 36.4 file this amici curiae brief in support of the granting of certiorari to review the first two questions presented by the certiorari petition.

INTEREST OF AMICI CURIAE

We 31 amici curiae states all have capital punishment statutes. Collectively, our states have 1,332 death row inmates, or over 98 percent of the total death row population in this country.[1] We are vitally concerned with any decision which restricts the applicability of the harmless error rule at the sentencing stage of a capital case, because such a decision threatens our ability effectively to advance the important state interests behind our capital punishment statutes. We need and seek a decision from this Court which will unify and reconcile the decisions concerning the nature and scope of the harmless error rule as it applies to the sentencing stage of a capital case.

In addition, we amici curiae states come from ten of the eleven federal judicial circuits.[2] We have a vital interest in any decision which expands a federal court's power to review a state court judgment in a 28 U.S.C. §2254 proceeding. Such a decision undermines our important interests in the finality of the judgments of our state courts, and it denigrates our authority to administer our criminal justice systems unhindered by federal court power that is not authorized by congressional enactment or by decision of this Court.

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[1]These figures, which include the death row inmates of Alabama, the state which filed the certiorari petition, are drawn from the NAACP Legal Defense and Educational Fund's "Death Row, U.S.A." report for May, 1984.

[2]Only the First Judicial Circuit not represented. The states comprising that circuit (4) have no inmates under a sentence of death.

The States of Florida and Georgia directly share with Alabama the burden of the decision below, because it is now the law of the Eleventh Circuit. The interests of the other amici curiae states are also affected by the decision, because defendants will cite it in other federal circuits and attempt to have the other courts of appeal adopt it.

SUMMARY OF ARGUMENT

Certiorari should be granted to review two of the questions presented in the petition. The first involves the holding of the Eleventh Circuit Court of Appeals that facial attacks on state statutes are cognizable in 28 U.S.C. §2254 proceedings, so that one to whom a state statute has been constitutionally applied may have the judgment in his case set aside based on the effect the statute may have had on a defendant in some other case. That unprecedented holding is contrary to the clear language of §2254, and it conflicts with decisions of this Court on standing.

The question presented is important because it involves the scope of review in the approximately eight thousand state prisoner habeas petitions that are filed in federal court each year. It is also important because of the nature of the interests involved. This Court in recent years has identified the traditional narrow limits of the writ of habeas corpus, because overextension of the writ entails heavy costs to our system of justice and to important principles of federalism. The decision of the court below expands significantly the scope of the writ, enlarges the costs imposed on the criminal justice system and jeopardizes sensitive federal-state relations.

Certiorari should also be granted to review the second question presented, which involves the applicability of the harmless error rule to the sentencing stage of a capital case. The holding of the federal appeals court carving out a broad category of sentence stage errors to which the harmless error rule may not be applied is of national importance. There are more than 1300 cases involving a sentence of death at the post-conviction stage in state or federal court, and because of the complexity and the fluidity of the constitutional doctrines applicable to capital sentencing, harmless error questions will arise in a significant number of cases.

The nature and extent of the harmless error rule's application to the sentencing stage of capital cases is also important because of the constitutional imperative that the death penalty be applied in a non-arbitrary and non-capricious fashion. Full application of the harmless error rule to capital sentencing defects or errors is necessary to minimize the danger of capricious results caused by death sentences being overturned even when there is no reason to doubt that these sentences are proper.

The holding below that a defendant can gain a reversal of his sentence because of an error or defect which is proven beyond a reasonable doubt to be harmless, is inconsistent with this Court's holding in *Strickland v. Washington*, 52 U.S.L.W. 4565 (1984), which requires a defendant to show prejudice from an attorney deficiency error at the sentence stage of a capital case. At the very least, there is enough apparent inconsistency between *Strickland* and the holding below that certiorari should be granted to review and reconcile the decisions concerning the requirement of prejudice and the harmless error rule in capital

sentencing. The states and the lower courts need guidance on this area of the law, and because the extreme facts of this case illuminate the issues well, it provides an ideal opportunity for this Court to provide such guidence.

ARGUMENT

I. Certiorari Should Be Granted To Review The Holding That Federal Habeas Corpus Review Extends To Facial Attacks On State Statutes.

In this case, a federal appeals court has held that facial attacks on state statutes are cognizable in 28 U.S.C. §2254 proceedings, so that a state prisoner to whom a statute is constitutional as applied may obtain federal habeas relief based upon how the statute might have affected some other prisoner in an unrelated case. *Ritter v. Smith,* 726 F.2d 1505, 1516-1517 & n. 24 (11th Cir. 1984) (Pet. App. 38a-39a, 58a). As the authorities discussed on pp. 35-42 of the certiorari petition establish, the holding below is an unprecedented and alarming expansion of federal court power to review collaterally state court criminal judgments.

28 U.S.C. §2254(a), as written by Congress, provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only on the ground that he* is in custody in violation of the Constitution or laws or treaties of the United States.

(emphasis added). That statutory language clearly expresses the Congressional intent to restrict issuance of the writ to cases in which the habeas petitioner himself is in custody in violation of the Constitution. The statute does not permit, and indeed forbids, issuance of the writ where the state statute in question was constitutionally applied to the habeas petitioner before the court. Such a habeas petitioner is not himself "in custody in violation of the Constitution."

In this case, the district court found that the capital punishment statute was constitutional as applied to this habeas petitioner, *Ritter v. Smith*, 568 F.Supp. 1499, 1521-1522 (S.D. Ala. 1983) (Pet.App. 157a-158a), because the alleged defect could not conceivably have affected him in view of the extraordinary facts and circumstances in his case, *id.*, at 1508-09, 1521-22 (Pet.App. 94a-96a, 157a-158a). Without disturbing that conclusion or the factfindings on which it was based, the appeals court nonetheless ordered the writ granted because the statutory defect might have affected some other state inmate who, unlike this one, was involved in "a close case." *Ritter v. Smith*, 726 F.2d at 1516 n. 24 (Pet.App. 58a).

The Court below has, in effect, amended 28 U.S.C. §2254(a) so that it now reads:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he, *or some other inmate tried under the same statute,* is in custody in violation of the Constitution or laws or treaties of the United States.

(italicized words added). The Court below has converted the federal habeas corpus statute into a declaratory judgment statute. Under its decision, the restrictions on standing to litigate the rights and interests of others, which have heretofore applied generally, *e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); *United States v. Raines*, 362 U.S. 17, 21 (1960), will no longer apply to habeas corpus petitioners.

Ironically, in an area where this Court has labored in recent years to minimize state-federal friction, *see, e.g., Engle v. Isaac*, 456 U.S. 107 (1982); *Rose v. Lundy*, 455 U.S. 509 (1982); *Stone v. Powell*, 428 U.S. 465 (1976), the Eleventh Circuit Court of Appeals has, by its expansive interpretation of its power in the context of a habeas corpus proceeding, created a new area of tension which seriously undermines the concept of federalism embodied in this Court's decisions in *Engle, Rose,* and *Stone*. Under the decision below, state statutes can be reviewed on their face at the behest of anyone convicted under them, and otherwise valid state court judgments can be set aside by a federal court because of what may have occurred or even simply theoretically might occur in a different case.

This question presented is one of national importance. There were over eight thousand habeas petitions filed by state prisoners in the federal district courts in the last year for which data is available, and the number of such petitioners has been increasing in recent years.[3] The

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[3]Department of Justice, Bureau of Justice Statistics, *Habeas Corpus: Federal Review of State Prisoner Petitions* (released May 1984), at 3. The latest year for which data is available is 1982, when 8,059 habeas petitions were filed in federal court by state prisoners. That number is an all-time high, and it represents a fourteen percent increase over 1980.

proper scope of review in such proceedings is a question which affects a significant number of cases, and it also affects important interests.

The interests affected are important, because "the Great Writ entails significant costs," *Engle v. Isaac,* 456 U.S. 107, 126 (1982), and those costs are multiplied whenever the writ is extended beyond its proper scope. This Court noted in *Engle* that, "[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused." *Id.,* at 126-27. Such review also undermines legitimate interests in the finality of litigation and thereby frustrates the goal of deterrence and any prospects of rehabiliation. *Id.,* at 127 & n. 32. This Court noted that, "[l]iberal allowance of the writ, moreover, denigrates the prominence of the trial itself," and may thereby actually diminish the sanctity of safeguards intended to protect the accused. *Id.,* at 127.

This Court also acknowledged in *Engle* that, "writs of habeas corpus frequently cost society the right to punish admitted offenders," because of the difficulties of retrying a case long after the crime was committed. *Id.,* at 127-128. All of these costs affect and concern us, the amici states. However, the greatest cost the writ entails for us was summarized by this Court in *Engle* as follows:

> Finally, the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.

See Schneckloth v. Bustamonte, 412 U.S. 218, 263-265 (1973) (Powell, J., concurring).

Id. at 128 (footnote omitted).

The costs entailed by a legitimate issuance of the writ of habeas corpus are severe enough. When the scope of the writ is expanded beyond its statutory limits and beyond the bounds of this Court's decisions, the costs are more than the states and society as a whole should have to bear. *See, Rose v. Mitchell,* 443 U.S. 545, 585-586 (1979) (Powell, J., concurring) (expansion of the writ "inflicts substantial costs on society, our system of justice and our federal fabric"). This Court should protect us from those unnecessary costs by reviewing the decision of the federal appeals court insofar as it holds that facial attacks on state statutes are cognizable in federal habeas corpus proceedings.

II. Certiorari Should Be Granted To Review The Holding That The Harmless Error Rule Is Inapplicable To Certain Types Of Defects In The Sentence Stage Of A Capital Case.

The second question presented by the certiorari petition concerns the Eleventh Circuit Court of Appeals holding that the harmless error rule is completely inapplicable to certain types of errors and defects at the sentencing stage of a capital case. The court below held that defects in capital punishment statutes or procedures which inject impermissible or irrelevant considerations into the sentence be set aside, even if it is proven beyond a reasonable doubt that the error or defect was harmless and that the same sentence would have been imposed if the defect or error had not existed. *Ritter v. Smith,* 726 F.2d 1505, 1517-1519 (11th Cir. 1984) (Pet. App. 39a-49a).

In applying the harmless error rule, the district court in this case found beyond a reasonable doubt that: the habeas petitioner before it [the respondent here] was not harmed or prejudiced by the alleged defects in the sentencing procedures; Ritter would still have been sentenced to death even if the alleged defect had not existed; and "no sentencing authority could reasonably have sentenced [him] to anything other than death regardless of the sentencing procedures employed." *Ritter v. Smith,* 568 F.Supp. 1499, 1508-1509 (S.D. Ala. 1983) (Pet. App. 94a-96a). In so finding, the District Court relied upon the fact that Ritter sought the death penalty immediately upon capture and at trial, and even threatened the jury if the jury failed to impose the death penalty. The Circuit Court never questioned the evidentiary basis of the District Court's findings.

Those unusual facts illuminate the harmless error issue in an extraordinary fashion, but the issue itself is one of general interest. There are now 1,351 murderers on death row in 33 states.[4] While the states with capital punishment statutes have worked diligently to enact and maintain procedures which comport with the constitutional doctrines announced by this Court and the lower federal courts, the task has not been a simple one. As this Court itself noted in *Lockett v. Ohio,* 438 U.S. 586, 602 (1978), "[t]he signals from this Court have not, however, always been easy to decipher." The signals of some of the federal courts of appeal have been even more difficult to decipher. Moreover, all the conceivable questions in the capital pun-

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[4]NAACP Legal Defense and Educational Fund, "Death Row, U.S.A." (May 1984). According to that report five other states have capital punishment statutes but no inmates on death row.

ishment area have not been answered, and the applicable doctrines are fluid ones.

As a result, a large number of state capital punishment sentencing provisions, of both statutory and case law origin, have been struck down since *Furman v. Georgia,* 408 U.S. 238 (1972), and more may be struck down in the future by one federal court or another. That makes any holding that the harmless error rule is inapplicable to broad categories of capital sentencing errors or defects important.

There is another general interest which the ruling of the federal appeals court in this case jeopardizes. Every state with a capital punishment statute has an interest in applying that statute in a non-arbitrary and non-capricious fashion. Indeed, such an interest is a constitutional imperative under *Furman* and its progeny. This constitutionally significant interest is impaired by decisions which undercut the application of the harmless error rule to cases in which the result would unquestionably have been the same regardless of the error or defect. In *Ford v. Strickland,* 696 F.2d 804 (11th Cir. 1983), Chief Judge Godbold spoke of the importance of applying the harmless error rule to errors or defects in the sentencing stage of a capital case. He said:

> Absent a harmless error rule, the death sentencing process will become so time-consuming and cumbersome that the death sentence will be imposed rarely and freakishly, in violation of *Furman v. Georgia,* 408 U.S. 238 (1972). I believe that the Supreme Court did not intend that.

Id., at 823 (concurring opinion).

Disregarding Judge Godbold's concern, the panel of the court of appeals which decided this case carved out

a category of sentencing errors or defects to which the harmless error rule will not be applied no matter what the situation. That court's reliance on *Zant v. Stephens,* 103 S.Ct. 2733 (1983), and *Lockett v. Ohio,* 438 U.S. 586 (1978), for its result is wrong, Pet. at 44-47, and its result appears to squarely conflict with the rationale of *Hopper v. Evans,* 456 U.S. 605 (1982), which applied the harmless error rule to the guilt stage of a capital case, Pet. at 47-49.

The holding of the court below also appears to squarely conflict with the holding of this Court in *Strickland v. Washington,* 52 U.S.L.W. 4565 (1984), concerning ineffective assitsance of counsel. In *Strickland,* this Court held that even when trial counsel has made a serious error that is professionally unreasonable in representing the defendant at the sentence stage of a capital case, the death sentence is not to be set aside "if the error had no effect on the judgment." 52 U.S.L.W. at 4571. The defendant must show prejudice from the error, and it is not enough for him to show that the error had "some conceivable effect on the outcome of the proceeding." 52 U.S.L.W. at 4572. Instead, he must show that there is a "reasonable probability" that but for the errors "the result of the proceeding would have been different." *Id.*

There are two possible results of comparing *Strickland* with the court of appeals holding in this case, and both warrant the granting of certiorari. The first possibility is that the two decisions are inconsistent. Both decisions involve errors at the sentence stage of a capital case, and in both the errors are such that the outcome may be affected in some cases depending on the facts and circumstances. *Strickland* holds that the defendant must show prejudice before gaining a reversal, while the deci-

sion below holds that a reversal is due even if the state proves beyond any reasonable doubt that there was no prejudice. There is a great doctrinal distance between predicating a reversal on a showing of prejudice by the defendant, on one hand, and granting a reversal even when the state proves beyond a reasonable doubt that there was no harm or prejudice, on the other hand. If, as amici believe, there is no legitimate way to bridge that doctrinal distance, then the decision below should be reversed because of *Strickland,* and certiorari should be granted for that reason.

The second possibility is that there is some non-apparent way to reconcile the decision below with *Strickland,* and with *Hopper v. Evans, supra,* which applied the harmless error rule to facial defects in a capital punishment statute. If the decision below can be reconciled with *Strickland* and *Hopper v. Evans,* then this Court should grant certiorari for that purpose. We the amici states, and our courts, need guidance as to the exact nature, scope, and extent of the harmless error rule insofar as errors or defects in the sentencing stage of a capital case are concerned. The extraordinary facts of this case illuminate the issues well and make it a perfect vehicle for providing such guidance.

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CONCLUSION

In view of the foregoing, amici curiae respectfully submit that certiorari should be granted to review the first two questions presented in the certiorari petition.

Respectfully submitted,

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